

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WANETA MASON

Claimant

VS.

TRAVELERS BUDGET INN

Respondent

AND

**KANSAS RESTAURANT & HOSPITALITY
ASSOCIATION SELF INSURANCE FUND**

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

DOCKET NO. 160,071

ORDER

ON the 22nd day of February, 1994, the application of the Fund for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge George R. Robertson, dated January 6, 1994, came on before the Appeals Board for oral argument by telephone conference.

APPEARANCES

Respondent and insurance carrier appeared by and through their attorney, Stephen M. Kerwick of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Kendall R. Cunningham of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is the same as that specifically set forth in the Award of the Administrative Law Judge, except that the Preliminary Hearing of December 9, 1991, has not been considered as the Kansas Workers Compensation Fund was not present at the hearing and has not agreed that it be considered.

STIPULATIONS

The stipulations of the parties are the same as those specifically set forth in the Award of the Administrative Law Judge.

ISSUES

The Administrative Law Judge ordered the Kansas Workers Compensation Fund to reimburse the respondent two-thirds of the benefits and reimbursable costs associated with this proceeding. The Kansas Workers Compensation Fund has requested the Appeals Board to review the issue of fund liability. That is the sole issue now before the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds as follows:

(1) The Kansas Workers Compensation Fund is liable for thirty-three percent (33%) of the benefits and reimbursable costs associated with this proceeding.

Claimant worked as a motel maid for the respondent Travelers Budget Inn. On September 20, 1991, claimant was washing a shower and her shoulder "froze". Claimant's job entailed changing bedding, making beds, cleaning showers, mopping floors, dusting, washing windows, and vacuuming. Typically, claimant cleaned sixteen rooms per day. If she had no other help, claimant would be required to clean as many as twenty-three rooms per day. Claimant often worked seven days per week.

Claimant first experienced right shoulder problems in approximately June of 1990. At that time, a physician gave her medication and the symptoms resolved. During 1991, claimant's shoulder symptoms returned and progressed to the extent that claimant, on certain days, was unable to do her job or had to leave work early.

Prior to September 21, 1991, the managers of the respondent motel, John and Roxy Crawford, would help claimant with her duties when they knew she was having problems with her shoulder and arm. On a few occasions, the Crawfords would call in another maid to help claimant or to finish the rooms she could not complete. Approximately one month before the September 1991 accident, Roxy Crawford began giving claimant medication that Mrs. Crawford had obtained from the doctor's office where she also worked.

Under the provisions of K.S.A. 44-567, an employer who operates within the provisions of the Workers Compensation Act and who knowingly employs or retains an employee that has an impairment that would otherwise constitute a handicap in obtaining or retaining employment shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof.

The Appeals Board finds that under the facts presented, the respondent, Travelers Budget Inn, possessed knowledge of claimant's right shoulder condition prior to September 21, 1991, and that the impairment was of sufficient nature to constitute a handicap in claimant's obtaining or retaining employment.

Whenever an employee is injured or disabled as a result of an injury and the injury probably or most likely would have been sustained or suffered without regard to the employee's pre-existing physical impairment, but the resulting disability was contributed to by the pre-existing impairment, the Director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the pre-existing impairment and the amount so found shall be paid by the Workers Compensation Fund. See K.S.A. 44-567(a)(2).

The question of apportionment is answered by the sole medical expert that testified in this proceeding. Board-certified orthopedic surgeon, Mark Melhorn, M.D., testified that prior to September 21, 1991, claimant had tendinitis and inflammation in her shoulder. Although Dr. Melhorn could not state that the incident on September 21, 1991, would not have occurred but for the pre-existing physical impairment, he felt that the pre-existing condition contributed thirty-three percent (33%) to the ultimate impairment. Dr. Melhorn's opinion is uncontroverted and credible.

Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976)

Based upon the above, the Appeals Board modifies the decision of Administrative Law Judge Robertson in his Award dated January 6, 1994, and finds that the Kansas Workers Compensation Fund is liable for thirty-three percent of the cost and reimbursable expenses associated with this proceeding.

(2) The Appeals Board adopts the findings and conclusions of Administrative Law Judge George R. Robertson as set forth in his Award of January 6, 1994, that are not inconsistent with those specifically set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated January 6, 1994, is modified in the respect that the Kansas Workers Compensation Fund is responsible for thirty-three percent (33%) of the compensation and reimbursable costs arising from this proceeding. The remaining orders of the Administrative Law Judge as contained in his Award of January 6, 1994, are adopted by the Appeals Board and incorporated herein by reference as if fully set forth.

IT IS SO ORDERED.

Dated this ____ day of April, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Stephen M. Kerwick, 700 Fourth Financial Center, Wichita, KS 67202
Kendall R. Cunningham, 125 North Market, Suite 1416, Wichita, KS 67202
George R. Robertson, Administrative Law Judge
George Gomez, Director